The State Bar of California

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Andrew Arruda and Joanna Mendoza
Date: October 7, 2019
Re: D.1. Recommendation 2.1: Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.

Recommendation 2.1 has received a total of approx. 278 comments, 219 in opposition, 52 in support, and 7 with no stated position.

Recommendation 2.1 (ABS Entities Composed of Lawyers, Nonlawyers or Both)[ABS/MDP]	
Recurring Point	Possible Response
Law firms could become accountable to shareholders, not to their clients. The clients' interests will not be paramount. This is dangerous for California consumers.	Notwithstanding any reforms to permit ABS or fee sharing, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to minimize or prevent consumer harm. If it's a likely risk we should look at how to manage the risk. We should focus on what is actually probable and can be reasonably anticipated, not assume the theoretically possible worst case scenario as a basis to not pursue new options. The recurring argument in opposition implies that those who are not lawyers can be expected to take advantage of clients, that they will cause lawyers to betray clients, and that lawyers are so weak willed they will give in to such pressure and risk disbarment. There is simply no evidence to support such an assertion. There is a strong case to be made that non-lawyers are fully capable of conducting themselves with the integrity and impartiality we expect from lawyers.

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	The argument suggests a false choice that we either sacrifice the sanctity of legal profession or encourage a system that fails to provide access to those in need of legal services. There is no reason we cannot maintain an ethical profession while expanding access through different business models. No other profession deals in such absolutist choices, nor is there any reason to believe the legal profession will devolve into dishonorable chaos. In-house counsel report to non-lawyers who control their position and income, yet we trust these attorneys to not only resist improper pressure to violate the rules of professional conduct but to report misconduct by those who may be their superior. Large, publicly-owned, multi-national law firm, Slater & Gordon, specifically disclosed "risks" in its IPO offering for potential share purchasers that the firm's loyalties were courts, clients and then shareholders – in that order. The shareholders are aware of this and accept that shareholder value is not the highest priority. Over a period of several years there have been no reported ethical difficulties or accusations that the public ownership has corrupted its lawyers' professional duties or harmed their clients' interests. This is an example of how the perceived risks can be managed. Law firms often take out loans with financial institutions which makes them economically beholden to those institutions. There is no evidence that lawyer independence has been severely compromised by this form of transaction. Where about 70% of all Californians are not receiving legal services to address a civil justice legal problem, the public is not being adequately protected. The Task Force's ABS reform concepts seek to increase access. For example, one change

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	to current law might be to relax UPL prohibitions to allow regulated entities to develop new delivery systems. The goal would be to facilitate the ability of lawyers to enter into financial arrangements with nonlawyers to develop or administer cutting-edge legal technology or innovative delivery systems. The task force was informed from discussions with legal technologists on the task force and otherwise, that a primary impediment to such arrangements is the inability of lawyers to share with nonlawyers any portion of the legal fees paid by clients.
This would potentially allow for a larger number of legal entities to provide services. I agree that it's important to have different regulations depending on the makeup of the group. [NOTE: this comment is in support]	The Task Force agrees that the composition of an ABS may call for some differences in regulations. Proactive risk based regulation and implementation concepts such as a regulatory sandbox are all designed to strategically explore expansion of market participants while valuing regulatory restraints that are necessary for public protection.
I completely support this objective, however, I believe CLS credits or education and/or a legal certificate of some sort should be required if the non-lawyer lacks a law degree. [NOTE: this comment is in support]	Imposing robust eligibility requirements is an important consideration. In Washington State, for example, among the eligibility requirements to be a LLLT are: 45 hours of paralegal studies; 15 hours of family-law-specific course work from a law school, ABA approved paralegal program, or LLLT Board; and 3,000 hours of law–related work experienced supervised by an attorney. On the other hand, Washington State is reconsidering its requirements due to their impediment to entry. If the bar is set too high it can impede progress and the intent of the original policy. The implementation phase of these policies will weigh the risks/benefits with regard to various requirements to be considered and then implemented.

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I can foresee conflicts of interests arising. I can foresee non-lawyers dictating how a case should be handled, instead of relying on the advise and decision of the lawyer. Non-lawyers are not bound by the same ethical duties and obligations. This sounds like a dangerous path to go down.	[The response to the first point would also apply here, as both are raising the issue of lawyer independence and ethics] Notwithstanding ABS reforms, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. The illustration draft of one of the Task Force's fee sharing options has, among other client protection requirements: (i) a requirement there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; and (ii) a requirement that the total fee charged to a client must not be excessive (i.e., unconscionable) and not be increased solely by reason of the agreement to share the fee. Similarly, in considering implementation of ABS, there would be consideration of imposing specific regulatory oversight on the nonlawyer providers. For example, in the United Kingdom there are two significant regulatory requirements: (i) a nonlawyer owner must pass a "fitness to own test" aimed at assessing competence, honesty, integrity, reputation and financial soundness; and (ii) nonlawyers are subject to the Solicitors Regulation Authority (SRA) and the Legal Services Board that, among other things, impose the SRA Code of Conduct which mandates that that firms "have effective systems and controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook" and to "identify, monitor and manage risks to compliance." Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to minimize or prevent consumer harm.

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The proposals would only allow big corporations and insurance companies to make more profits at the expense of injured victims' rights	During the implementation phase the regulations can be crafted in such a way that protects clients as necessary while permitting law firms and others to innovate in ways that serve clients better. An absolutist approach precluding *all* non-lawyer representation or business contact with the legal profession in *all* circumstances fails to consider alternatives that might, on balance, benefit the public interest at no significant risk of harm to clients. The necessary capital for innovation is largely inaccessible to law firms while otherwise readily available to other industries, thereby severely restricting innovation in the legal services industry. Whether the capitol source is a venture fund, angel fund, structured finance fund, private equity fund, family offices serving high-net-worth investors or other investment entities, the people who make the investments want equity in exchange for their investment. If they know they are investing in a legal service entity that must put the courts and clients ahead of the owners, they will weigh that factor into their decision. The investment does not need to be at the expense of clients, and it will more likely expand the legal industry in ways that have not been allowed except in other jurisdictions. Lawyers are currently denied the use of two key ingredients necessary to increase efficiency and innovation – institutional equity investment and ownership by allied professionals that bring a different range of skills and expertise to legal services. In addition, there are plenty of examples of greedy law firms, selfish lawyers, disloyal partners – all of which has occurred without any assistance from non-lawyer owners. In fact, the current lawyer-owned law firm business model that fixates on per-partner-profits, produces undesirable lawyer

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	behavior on its own (e.g. minimum billable hour requirements with resulting padded bills and fraudulent billing practices). Law firms do not need to fear that non-attorney owners will be obsessed with short-term profit to be emptied into their pockets at the end of every year – the legal industry already has those. Law firms behave like other businesses because they are businesses. The ethical rules in place to guard against harm to clients remain in place despite these being businesses that are profit driven. Nearly every lawyer has financial obligations they must consider as they practice law, and the attorneys are still required to put the courts and clients ahead of those obligations. There is no reason to believe that lawyers will become corrupted under a different entity ownership structure. There is no evidence to establish that lawyer control of firms has resulted in those entities consistently placing the interests of clients, communities and society above the interests of the lawyers. Lawyer owned firms will still exist, and in that regard they will be able to prove, in direct competition with other models, that they are better for clients, lawyers, staff and society. If this bears out, they have nothing to fear. In those jurisdictions that allow non-lawyer ownership in the legal services industry (e.g., UK, Australia and DC), there is not now nor has there ever been any data to support policies restricting investment and ownership. In fact, in the UK it was recently reported that ethical complaints have actually gone down since this policy was enacted. With such a large justice gap in California, if big corporations (e.g. Walmart, Amazon) do step into the industry to hire lawyers in order to provide legal services, it could mean that this gap is being filled in new and innovative ways. Walmart already provides reasonably and transparently priced

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	options for other professional services, such as medicine, dentistry, audiology, optometry, pharmacy services, counseling services, nutritional services, and veterinary care. This allows the retail giant to provide critically needed, affordable services to many of its customers, which is particularly important in more rural areas that do not have as much access to those services. It is not just about price, but also about placement and easy accessibility of services. Multiple professional services have been integrated into corporate models without significantly risking the health, safety, or security of customers in need of those services. Large corporations and tech companies may have a big role in increasing the visibility of legal services and making those services more approachable. As a result, it is also possible that low- to moderate-income clients will become more inclined to seek attorneys at traditional law firms when possible. The price of fear of unproven consequences within the legal profession should not be paid in completely unnecessary and extraordinarily limited access for low- and moderate-income clientele. With such a large majority of Californians currently receiving no legal help who need it, this type of model would result in more attorneys being employed and more people having access to services they need to close the justice gap. Finally, proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to minimize or prevent misconduct by nonlawyer owners. In other jurisdictions, regulatory restraints are used to avoid nonlawyer misconduct. As examples, this includes requirements for lawyer majority

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	ownership of law practices (ABS in Italy) and the system used in the United Kingdom that has two significant regulatory requirements: (i) a nonlawyer owner must pass a "fitness to own test" aimed at assessing competence, honesty, integrity, reputation and financial soundness; and (ii) nonlawyers are subject to the Solicitors Regulation Authority (SRA) and the Legal Services Board that, among other things, impose the SRA Code of Conduct which mandates that that firms "have effective systems and controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook" and to "identify, monitor and manage risks to compliance."
The proposal does nothing to enlarge access to the courts, dispute resolution or competent legal services. The idea that opening the practice of law to persons or entities, which have no demonstrated competence in the practice of law, will improve access to legal services is a non sequitur. it will simply enable many of the unscrupulous persons now engaging in the unauthorized practice of law (UPL) to start working openly without any attempt to guarantee their ability to do so.	[This seems more like a comment on allowing non-attorneys to practice rather than non-attorney ownership and we would defer to the responses on that recommendation.] The Task Force was given a specific charge to study AI, technology and online delivery systems with dual goals of increased access to legal services and public protection. A list of other potential different initiatives (i.e., not technology-driven initiatives) including those by commenters who are focused on enhancing a litigant's access to the courts will be compiled as an appendix to the Task Force's final report. U.S. Census data suggests that there are segments of the people-law sector that are presently underserved by traditional law firm providers. These consumers might benefit from the provision of limited, specified legal services rendered by regulated nonlawyer providers. Prof. Stephen Gillers submitted comment to the Task Force that: "For example, in Washington State, LLLTs charge substantially less than lawyers for the services they

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	are authorized to perform, about $60 to $120 hourly according to a 2018 article in the Seattle Times quoting a Washington State Bar officer. Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to minimize or prevent misconduct by nonlawyer owners. In other jurisdictions, imposition of regulatory restraints is used to avoid nonlawyer misconduct. As examples, this includes requirements for lawyer majority ownership of law practices (ABS in Italy) and the system used in the United Kingdom that has two significant regulatory requirements: (i) a nonlawyer owner must pass a "fitness to own test" aimed at assessing competence, honesty, integrity, reputation and financial soundness; and (ii) nonlawyers are subject to the Solicitors Regulation Authority (SRA) and the Legal Services Board that, among other things, impose the SRA Code of Conduct which mandates that that firms "have effective systems and controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook" and to "identify, monitor and manage risks to compliance."
This proposed regulation would cause unscrupulous marketing companies to attempt to direct all marketing leads to lawyers based upon money, and not upon a lawyer's skill. ~~Huge corporations, such as Google will monopolize the legal services market.~~	[This second part of the comment is identical to the big corp/tech company comment above – delete that part so we don't need to repeat a response here] Notwithstanding any reforms to permit ABS or fee sharing, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to

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	minimize or prevent consumer harm. In other jurisdictions, imposition of regulatory restraints is used to avoid impairing client protection. As examples, this includes requirements for lawyer majority ownership of law practices (ABS in Italy) and fitness to own scrutiny for nonlawyers (in the U.K.).
Most people cannot afford lawyers due to high cost of living. It's in the best interest for low income families. [NOTE: this comment is in support]	The Task Force agrees that consumers might benefit from the provision of limited, specified legal services rendered by regulated nonlawyer providers. Prof. Stephen Gillers submitted comment to the Task Force that: "For example, in Washington State, LLLTs charge substantially less than lawyers for the services they are authorized to perform, about $60 to $120 hourly according to a 2018 article in the Seattle Times quoting a Washington State Bar officer. [The Walmart discussion above may want to be repeated here]
This is an attempt by the tech industry to destroy the legal industry. This will lead to corruption.	[This is just a different version of the comment above re: big corporations and insurance companies and the response provided would apply equally – we should either combine them or repeat the same response] The Task Force was created by the California State Bar Board of Trustees. No one on the Board is part of the tech industry nor seeks to destroy the legal profession. The legal profession has failed to adequately address the ever-growing justice gap in society in spite of the profession's obligation to serve and improve the justice system. The legal profession has not evolved or sought systemic changes that could create better means of delivering legal services. There is no evidence that this effort is being manipulated by the technology industry nor that it will lead to corruption. In those jurisdictions that allow non-attorney ownership,

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	there is no evidence that it has lead to corruption. In fact, in the U.K. there are fewer ethical complaints since the policy was implemented. Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to minimize or prevent misconduct by nonlawyer owners. In other jurisdictions, imposition of regulatory restraints is used to avoid nonlawyer misconduct. As examples, this includes requirements for lawyer majority ownership of law practices (ABS in Italy) and the system used in the United Kingdom that has two significant regulatory requirements: (i) a nonlawyer owner must pass a "fitness to own test" aimed at assessing competence, honesty, integrity, reputation and financial soundness; and (ii) nonlawyers are subject to the Solicitors Regulation Authority (SRA) and the Legal Services Board that, among other things, impose the SRA Code of Conduct which mandates that that firms "have effective systems and controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook" and to "identify, monitor and manage risks to compliance."
Attorneys won't have independence if they are taking orders from nonlawyers. It will create ethical dilemma for lawyers and change the legal marketplace where small practices will be bought out. Also, nonlawyers will view law as a business and prioritizing business profit will conflict with duty of loyalty to clients.	[This is the same type of comment as the first discussing clients' interests not coming first AND the comment about conflicts of interest and non-lawyers restricting lawyer independence – we should choose one or summarize the sentiment in a single comment. Or, the response should be repeated here] Notwithstanding any reforms to permit ABS or fee sharing, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. Proactive

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	risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to minimize or prevent consumer harm. In other jurisdictions, imposition of regulatory restraints is used to avoid impairing client protection. As examples, this includes requirements for lawyer majority ownership of law practices (ABS in Italy) and fitness to own scrutiny for nonlawyers (in the U.K.).
The Task Force should reconsider whether registration and regulation is necessary as there is a high likelihood that such oversight would deter innovation and investment, especially when the reforms are new and participation needs to be encouraged.	The Task Force's recommendations must adhere to the dual goals of increasing access and enhancing public protection. Some regulatory oversight seems reasonable as a way to accomplish the goal of public protection. The extent of regulatory oversight can be assessed using implementation concepts that generate empirical data such as a regulatory sandbox. The Task Force is mindful that over-regulation will be a bar to entry and work against the policy goals. The implementation phase to follow will need to weigh these competing interests accordingly.